(18)

No. 91-948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHURCH OF THE LUKUMI BABALU AYE, INC., and ERNESTO PICHARDO,

Petitioners,

—v.—

CITY OF HIALEAH,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PARTIES TO THE PROCEEDING

All parties are named in the caption of the case. The Church of the Lukumi Babalu Aye, Inc. has no parent corporations or subsidiaries.

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The key points that control this case are few and clear. These points recur throughout the details necessary to a thorough analysis of the City's multiple ordinances and alleged compelling interests.

Government cannot regulate religion, except as the incidental effect of generally applicable laws. These ordinances single out religion for regulation that does not apply to the same acts when conducted for secular reasons. The City concedes that it has no generally applicable ban on killing animals. City Br. 21.

If these ordinances can be justified at all, it is only by proof that discrimination against religion is the least restrictive means to serve a compelling interest. But none of the City's alleged interests is compelling, and none is unique to religion. The City has forbidden a religious ritual, but it does not forbid secular conduct that causes the same harms.

The City opens its brief by charging that petitioners "misrepresent several critical findings of the district court." City Br. 2. The alleged misrepresentations involve nothing more than disagreements about the legal significance of findings and conclusions that both sides quote or describe in almost identical terms. But the City's own carelessness with authorities and the record extends even to omitting critical words from its quotation of one of the ordinances, see *infra* at 9-10, and to a wholly false claim that three of the ordinances were not challenged below, see *infra* at 12-13 & n.8. These disagreements will be considered at the relevant points in this brief.

I. THE ORDINANCES DISCRIMINATE AGAINST RELIGION.

A. Laws That Burden Religious Exercise Must Be Neutral and Generally Applicable.

The City believes that it may "select one phase of one field and apply a remedy there, neglecting the others,"

even if the one field it regulates is religion. City Br. 22, quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), and citing *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935). *Lee Optical* is the classic casebook example of total judicial deference to economic regulation. The City thinks that discriminating between the religious and the secular is just like imposing different regulation on optometrists and opticians, or on dentists and physicians.

The City finds it "most illogical" that it cannot forbid religious killings of animals while permitting secular killings of animals. City Br. 21. Hialeah claims that it can define offenses in religious terms, *id.* at 16, enact a law that "primarily burdens those of a particular religious faith," *id.* at 15, 26-27, enact such a law in direct response to religious conduct, *id.* at 25-26, and distinguish lawful from unlawful conduct on the basis of the religious or secular motive for engaging in the conduct, *id.* at 27 (sentence beginning "Moreover,"), and that all these elements in combination are consistent with its duty of neutrality toward religion.

The City incorrectly claims that "*Smith* specifically rejected" the rule "that religious motives must be included among legally permissible motives if the legality of a regulated act depends upon the actor's motives." City Br. 27, citing 494 U.S. at 883-85, with no reference to any specific language. To the contrary, *Smith* repeatedly reaffirms that the illegality of conduct cannot depend on the actor's religious motivations. The state may not ban acts "only when they are engaged in for religious reasons." *Id.* at 877. If regulation depends upon "individualized governmental assessment of the reasons for the relevant conduct," then the state has "a system of individual exemptions, [and] it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884.

B. These Ordinances Are Neither Neutral Nor Generally Applicable.

1. The Discriminatory Pattern Common To All The Ordinances.

a. Discrimination Against Religious Reasons For Killing Animals. Hialeah concedes "that neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." City Br. 21. But if the ordinances burden religion and are not generally applicable, they must be justified by a compelling interest. *Smith*, 494 U.S. at 884.

The City offers two sets of reasons for distinguishing religious killings from secular killings. First, the City says that there are "evils specifically associated with animal sacrifices." City Br. 21. This is not a neutrality argument; this is a compelling interest argument. By offering the alleged evils of animal sacrifice to show the neutrality of the ordinances, the City is attempting to escape from the compelling interest standard to the *Lee Optical* standard. The City in effect says that if it asserts a reason for discriminating against religion, the discriminatory ordinances are neutral, judicial review comes to an end, and the City need never show that its alleged reason justifies the restriction on religion. We will consider the City's alleged evils in their proper place, with the compelling interest arguments.

The City's second reason for distinguishing secular from religious killings of animals is even more revealing. The City finds it "self-evident" that secular killings of animals are important. City Br. 22. Hunting is "important;" exterminating pests is "justified;" reducing the population of dogs and cats "makes sense." *Id.* Presumably the new statutory exemption authorizing pet stores to feed warm-blooded animals to pets, §828.065 (Supp. 1992), also serves an important purpose in the City's view. But religious killings of animals are not "necessary." City Br. 14.

Here we get the essence of petitioners' case in the

City's own words. The City's concern for animal welfare is easily overridden. Animals may be killed for any reason that "makes sense" to the City. Not surprisingly, human interests and needs are far more important to the City than animal interests and needs. The problem is that religion does not count as a human need in Hialeah.[1]

The scope of these ordinances, as well as the history of their enactment, is wholly unlike the statute in *Smith*. The Oregon drug laws forbad a long list of drugs to every citizen in the state. Peyote fell naturally within the broad class defined by the statute; there was no hint of a gerrymander to "get" peyote worship. Even the narrow exception for medical use did not apply to peyote, because peyote is a Schedule I drug, and part of the definition of Schedule I drugs is that they have "no currently accepted medical use in treatment in the United States." 21 U.S.C. §812(b)(1)(B) (1988).

The City says that *Smith* implicitly approves a less rigorous policy of nondiscrimination, because it permitted Oregon to ban peyote while permitting tobacco. City Br. 10. But that issue was not presented to the Court in *Smith*, and it is not remotely analogous to this case. To argue that a broad statutory class could have been defined even more broadly is not at all the same as arguing that out of a broad range of reasons for killing animals, Hialeah has prohibited only the religious reason. The analogous law in *Smith* would be a law that permitted recreational use of peyote, cooking use of peyote, and ingestion to reduce the surplus quantities of peyote, but banned the ingestion of peyote in a ritual or ceremony.

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[1] The City says that unwanted pets may be killed only "in a painless fashion in regulated conditions." City Br. 22, citing Fla. Stat. Ann. §828.058 (Supp. 1992). But §828.058 applies only to animal shelters and similar facilities. §828.058(1)(a). If an owner kills his own unwanted animals, the killing is regulated only by the prohibition on torture in §828.12. Given the explicit statutory authorization for killing unwanted animals, such killings are not "unnecessary" killings.

The trial judge adopted the City's view that the ordinances were justified, and so he said that suppression of religion was "incidental to the ordinances' secular purpose and effect." Pet.App. A40. This was error, as explained below. But the trial judge did not make the further mistake of finding the ordinances neutral. To the contrary, he held that "the ordinances are not religiously neutral but were intended to stop the practice of animal sacrifice in the City of Hialeah . . ." Pet.App. A23. This holding did not trouble the trial judge, because he believed that "Strict religious neutrality is not required by the First Amendment." Pet.App. A40.

The City tries to rehabilitate this reasoning, claiming that the judge treated incidental benefits and burdens of neutral regulation as departures from neutrality. City Br. 24. The City draws this inference from the trial court's citation to Justice O'Connor's concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 82-83 (1985). But the City's argument misreads both the trial court and Justice O'Connor, as well as the trial court's other citations for the same point.[2]

Each of these opinions explained why express religious classifications do not violate the Establishment Clause when they merely relieve religious exercise from state-imposed burdens. Each of these opinions defended laws that expressly and exclusively targeted religious conduct for *exemptions*. This is how the trial judge understood these opinions; he said they hold that government "may take religion into account when necessary to further secular purposes," may enact "laws explicitly mentioning religious conduct so long as they serve a secular purpose," and may grant "explicit religious exemptions." Pet.App. A40. The trial court's mistake was to assume that it is equally permissible to impose explicit religious regulation. But targeted

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[2] *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974).

regulation of religion requires a compelling interest.

The City also defends the neutrality of its ordinances on the basis of the trial court's finding that "the council's intent was to stop animal sacrifice whatever individual, religion or cult it was practiced by." Pet.App. A28, quoted at City Br. 2, 23 and at Pet.Br. 14-15. The City believes it is sufficient that the ordinance would apply to other religions and not to Santeria alone. But it matters little whether the City aimed to suppress one faith or many. The Court took note of this possible misreading of *Smith* in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992): "[A] regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Id.* at 2899 n.14 (emphasis omitted).[3]

b. The Purpose To Suppress Religion. Given the anti-religious gerrymander in the text of these ordinances, the Court can reverse without drawing an inference of improper purpose. But the purpose to suppress religion remains clear. The trial court found that "the council's intent was to stop animal sacrifice." Pet.App. A28, A23.

The City suggests that legislative motive is irrelevant, citing cases from a variety of other contexts. City Br. 25.[4]

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[3] The City's charge that petitioners misrepresented the trial court's findings is followed by quotations relating to these questions about the meaning of neutrality and general applicability. City Br. 2. The City does not specify which of these quotations we misrepresented, for the obvious reason that we did not misrepresent any of them. See the City's quotation about stopping animal sacrifice, quoted at Pet.Br. 14-15; compare the City's quotation about zoning to the similar quotation at Pet.Br. 44-45; compare the City's quotation about secular purpose and effect to the discussion of secular interests at Pet.Br. 28-47.

[4] In *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984), the existence of a secular purpose made it irrelevant to the Establishment Clause whether the City also had a religious purpose. In *Palmer v. Thompson*, 403 U.S. 217 (1971), "the holding was that the city was not overtly or

But this case is controlled by *Smith*, which says that a law requires compelling justification if it forbids acts "only when they are engaged in for religious reasons," 494 U.S. at 877, or if suppression of religion is "the object" of the law, *id.* at 878. The first formulation refers to singling out religion on the face of the statute; the second refers to legislative purpose. This dual standard is clarified by *Smith*'s analogy to *Washington v. Davis*, 426 U.S. 229 (1976). 494 U.S. at 886 n.3. *Davis* reaffirmed the relevance of legislative purpose, whether or not that purpose "appear[s] on the face of the statute." 426 U.S. at 241. The rule was succinctly summarized in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979):

> A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

Id. at 272 (citations omitted). Similarly under *Smith*, the compelling interest test applies both to laws that draw express religious classifications and to technically neutral laws that are designed to suppress religion. The City's theory appears to be that anti-religious laws must be upheld without inquiry into legislative purpose so long as they do not name the targeted religion in the statutory text. That rule would empower any governmental unit to suppress any

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covertly operating segregated pools and was extending identical treatment to both whites and Negroes." *Washington v. Davis*, 426 U.S. 229, 243 (1976). The emphasis on statutory text in *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S.Ct. 1138, 1147 (1991), refers to statutory interpretation and not to discriminatory purpose. In any event, the discriminatory purpose here amply appears in the text of the ordinances and resolutions. See Pet.Br. 15. The cited pages of *Washington v. Davis*, 426 U.S. at 249, 256, are wholly irrelevant; perhaps the City meant to cite Justice Stevens' concurrence at 253. As explained in text, *Davis* supports petitioners on the relevance of purpose, as does the concurrence at 254.

minority religion with the most transparent of clever drafting.

2. The Text Of The Ordinances.

a. Ord. 87-71. Ord. 87-71 forbids sacrifice, defined as the unnecessary killing of an animal in a ritual or ceremony not for the primary purpose of food consumption. Pet.Br. 15. This ordinance expressly regulates religion, because sacrifice is a religious act. *Id.* at. 16-17. The City does not offer a secular definition of sacrifice, but it does argue that animals may be sacrificed in rituals and ceremonies by groups that are not constitutionally protected, offering the examples of voodoo, satanic cults, and witchcraft. City Br. 14-15.

The City offers absolutely no response to what petitioners have already said about these hypothetical secular applications. Pet.Br. 18-20 & n.7. Most important, the logic of *Smith* is that if religious minorities are regulated only by generally applicable laws, they will be protected by the political power of others subject to the same laws. The City does not dispute that this is the only basis on which *Smith* can make sense, and it does not make the absurd argument that a minority religion will be protected by a political alliance with witches, satanists, and voodooists.

The Court in *Smith* said that it "would doubtless be unconstitutional . . . to prohibit bowing down before a golden calf." 494 U.S. at 877-78. It did not matter to the Court that people might bow down before a golden calf for fraternity initiations, theatrical performances, party games, or other imaginative secular reasons, or that the golden calf law might not use the word "religion." But these formalistic distinctions would be dispositive under the City's reasoning.

The limitation to "ritual or ceremony" also indicates the religious focus of Ord. 87-71. The City cites two cases to support its right to regulate rituals. One is miscited, and the

other has been implicitly overruled.[5] The City's reliance on the discredited decision in *Davis v. Beason*, 133 U.S. 333 (1890), reflects its general view that the Free Exercise Clause is no constraint at all.[6]

b. Ord. 87-40. The only part of Ord. 87-40 at issue is the ban on "unnecessary" killings. Pet.Br. 21. The City's defense is either incomprehensible or uncomprehending. The issue is not vagueness, nor whether the City goes on an "ecclesiastical expedition." City Br. 14. The issue is simply that the necessity of animal sacrifice is inherently a religious question. The City's theological judgment is no less forbidden for being ill-considered.

c. Ord. 87-52. The City misstates the content of Ord. 87-52. The City says:

> The killing, slaughter or sacrifice of an animal by "any group or individual" is proscribed, regardless of whether the flesh is to be consumed. Ord. 87-52, § 6-9(2).

City Br. 16. What the cited section actually says is:

> This section is applicable to any group or individual that kills, slaughters or sacrifices animals *for any type of ritual*, regardless of

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[5] *Jones v. Butz* did *not* hold "that 'ritual' is not synonymous with 'religious.'" City Br. 16. Rather, it held that an exemption for ritual slaughter is permissible because the Establishment Clause does not forbid religious exemptions. 374 F. Supp. 1284, 1292-93 (S.D.N.Y.), *aff'd mem.*, 419 U.S. 806 (1974). *Davis v. Beason*, 133 U.S. 333 (1890), upheld a test oath that required citizens to swear that they were not members of any organization that advocated polygamy. See *id.* at 335-37. This oath had nothing to do with conduct; it was a pure regulation of association and belief. *Beason* was implicitly overruled in *Torcaso v. Watkins*, 367 U.S. 488 (1961).

[6] The City also asserts that the trial court "expressly found that Ordinance 87-71 . . . was 'neutral.'" City Br. 20, citing 723 F. Supp. at 1484 (Pet.App. A39-A41). Although "neutral" appears in quotation marks, the opinion never uses that word in connection with Ord. 87-71.

whether or not the flesh or blood of the animal is to be consumed.

Hialeah Code § 6-9(2), set out in Pet.Br.App. A-2 and City Br.App. A-5 (emphasis added).

Without the reference to ritual, and considered in isolation, § 6-9(2) would specifically target sacrifice, but it would add a seemingly general prohibition on killing any animal for any purpose. That is how the City characterizes it. Of course this prohibition would be subject to an exception for the food industry in § 6-9(3), Pet.Br. 23-24, and to a host of exceptions incorporated from state law in Ord. 87-40, but in artificial isolation it would seem to be generally applicable. With the critical language that the City omits, confining the offense to "any type of ritual," this paragraph is just like the other ordinances. If the limitation to ritual did not target religion, the City would not be afraid to quote it.

Ord. 87-71 distinguishes killings "not for the primary purpose of food consumption" from all other killings of animals. Pet.Br. 15. Ord. 87-52 carries the gerrymander further, creating a special rule for killings where food is *a* purpose but not the primary purpose. See Pet.Br. 23-24. The trial court held that this distinction between primary and secondary purposes exempted Kosher slaughter from the ordinances without exempting Santeria sacrifice. Pet.App. A31. Petitioners argue that the discrimination between Kosher slaughter and Santeria sacrifice is a further reason for invalidating these ordinances. Pet.Br. 24-25.

The City responds with an argument that has no basis in the ordinances or the record. Discussing Ord. 87-52, the City says that "The Hialeah ordinance does not exempt kosher slaughter, it exempts any ritual slaughter which comports with the Federal Humane Slaughter Act" or its Florida equivalent. City Br. 17. No such exemption appears in the text of the ordinance, and the City made no such argument below. The City's argument on pre-emption was the one adopted by the trial court -- that the Humane

Slaughter Acts protect only slaughter and not sacrifice. Br. of Appellee in Ct. App. 46-47. The critical difference between Santeria sacrifice and Kosher slaughter is not in the Humane Slaughter Act, but in the City's distinction between primary and secondary purposes for killing animals and in its hostility to petitioners' religion.

d. Ord. 87-72. Ord. 87-72 forbids the killing of animals for food except in places zoned for slaughterhouses. Pet.Br. 25. The City says many things about Ord. 87-72, but few of them respond to the petitioners' claims. Ord. 87-72 continues and extends the religious gerrymander that runs through all the ordinances, and it was enacted for the very purpose of suppressing sacrifice. Pet.Br. 25-27.

Petitioners argued that the religious gerrymander appears in three ways. First, any attempt to apply the ordinance depends on simultaneous assertion of two inconsistent legal theories -- that sacrifice is slaughter for purposes of applying the ordinance, but that it is not slaughter for purposes of pre-emption. *Id.* at 25-26. The City ignores the argument that this inconsistency shows both religious gerrymander and discriminatory purpose, and instead offers entirely separate arguments that the ordinance applies and that pre-emption issues are not presented here. The ordinance applies because if an animal is killed in a ritual or ceremony not for the primary purpose of food consumption, and then the animal is eaten (so that food consumption must have been a secondary purpose), the killing is both a sacrifice and a slaughter. City Br. 18 n.7. Once again the criminal offense depends not on what petitioners do, but on an elaborate analysis of why they did it. The City's argument supports rather than refutes the claim of religious gerrymander.

The City also says that the pre-emption issues are not presented to this Court. Petitioners agree. But petitioners' decision not to present the pre-emption issues does not entitle the City to defend on the basis of an argument that would require it to assert two inconsistent positions in any

prosecution under the ordinance.[7]

The second indicator of religious gerrymander is that any attempt to apply Ord. 87-72 depends on a misclassification of petitioners' church and even Santeria homes as slaughterhouses. This misclassification depends on the fact that most of the animals are eaten, a purpose that the other ordinances deem secondary. The misclassification is also discriminatory because the City does not subject other killings of animals to slaughterhouse rules. Ord. 87-72 does not apply to veterinarians, humane societies, pet owners, exterminators, and property owners putting out poison, and despite its literal language, there is no reason to believe it will ever be enforced against farmers, fishers, restaurants, or sales of seafood. With respect to lobsters, see Pet.Br. 13.

The third indicator of religious gerrymander is that the ordinance exempts the small-scale slaughter of hogs and cattle, which are not sacrificed, but does not exempt any animals that are sacrificed. Pet.Br. 26-27.

Ignoring the gerrymander, the City argues that Ord. 87-72 is really a zoning law, and that petitioners have not preserved an attack on zoning laws. City Br. 17-20, 30-31. This is preposterous. Petitioners have attacked Ord. 87-72 at every stage; that claim is fully preserved. See J.A. 11, 15. Petitioners have not attacked, and are not now attacking, any provision of Hialeah's zoning code. The site petitioners acquired was properly zoned for church use, Pet.App. A24 n.41, and a certificate of occupancy was issued, Pet.App. A26. Petitioners saw no need for a waiver or variance. If the City thought its zoning laws prevented sacrifice, it would not have enacted the challenged ordinances.[8]

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[7] The City says that "State preemption issues were not raised in the court of appeals." City Br. 17-18. This is incorrect. Appellants' Br. in Ct. App. 53-55. The preservation of error problem is that federal preemption issues were not raised in the trial court. Pet.Br. 38 n.12.

[8] The City notes that the trial court once characterized three of the four ordinances as zoning regulations, citing 723 F. Supp. at 1481 (Pet.App. A34), and then it says: "The district court found that Petitioners never sought any relief from *these* zoning ordinances," citing *id.* at 1479 (Pet.App. A29) (emphasis added). City Br. 1-2. This is incorrect. The court did not say that petitioners had not challenged the three ordinances referred to at 1481; he said that petitioners had not challenged "the validity of slaughterhouse zoning regulations that Plaintiffs might encounter."

If the City were ever to prosecute, or deny an occupancy permit, on the ground that petitioners were operating a slaughterhouse, the City and petitioners would litigate that issue at that time. The purpose and effect of Ord. 87-72 is to preclude that issue. Petitioners are subjected to slaughterhouse rules even though the deputy city attorney testified that their church would not be a slaughterhouse, Pet.Br. 26, and even though sacrifice has no more in common with slaughterhouses than other killings of animals in the City.

II. THE ORDINANCES ARE NOT JUSTIFIED BY A COMPELLING INTEREST.

A. The Courts Below Applied Erroneous Legal Standards To The Compelling Interest Issues.

"[I]t is the rare case" in which a discriminatory law can be justified by a compelling interest. *Burson v. Freeman*, 112 S.Ct. 1846, 1857 (1992) (plurality); *accord*, *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2550 n.8 (1992). The City's interest must uniquely justify discrimination against religion, Pet.Br. 28-30, and it must be so important that by necessary implication it overrides textually absolute constitutional rights, *id.* at 32-34.

The courts below erroneously equated compelling interests with "legitimate" interests. *Id.* at 31-32. The City makes the same equation, stating that all states have enacted "some form of statute" protecting animals, and that "state legislatures, *therefore*, have recognized by their statutes that

society has a compelling interest in protecting animals." City Br. 37-38 (emphasis added). The unstated premise is that every statute serves a compelling interest. Elsewhere, the City argues that its interest in zoning is compelling and that zoning laws "must be accorded considerable deference," apparently equating the two standards. *Id.* at 30.

Petitioners also argued that the courts below reversed the burden of proof, repeatedly requiring petitioners to "guarantee" that nothing would ever go wrong in any sacrifice of an animal. Pet.Br. 34-35. The City does not deny this reversal of the burden of proof, and says little to defend it. The City does argue with respect to public health that incremental reduction of risk is without more a compelling interest. City Br. 32-33. The City cites state court cases, and opinions of this Court that did not apply the compelling interest test,[9] but it does not cite for this proposition a single compelling-interest opinion of this Court.

B. When The Proper Legal Standards Are Applied, It Is Clear That These Ordinances Do Not Serve A Compelling Interest By The Least Restrictive Means.

Application of the compelling interest test presents a question of law to be decided by this Court after an independent examination of the whole record. Pet.Br. 36-37. The City does not dispute this standard of review.

The City's argument consists mostly of a summary of its own evidence below, with only occasional references to petitioners' analysis of that evidence. In broad terms, the City's argument comes to two points. Sacrifice harms animals, and sacrifice produces garbage. But the City does not distinguish this harm to animals from the harm caused by

[9] *Employment Division v. Smith*, 494 U.S. 872, 879 (1990); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940).

all the other killings of animals, or explain how this garbage is different from any other garbage. The City cannot ban a religion as a step toward more general goals. It cannot use religion as a proxy for other goals even if the goals are legitimate. Where First Amendment rights are at stake, the City must define prohibited conduct in terms of the harm to be prevented.

1. The Harm To Animals.

The parties agree that the trial court found three harms to animals: inadequate care prior to sacrifice, fear prior to sacrifice, and sacrifice itself. Pet. Br. 37-38; City Br. 38.

Inadequate care prior to sacrifice occurs on the botanicas and farms that supply animals for sacrifice. Pet.App. A17-A18. The City says that regulation of these commercial establishments has been ineffective, City Br. 7-8, but they are the most public and visible step in the whole process, and they are entitled to no independent First Amendment protection. Commercial abuses by others are not a reason to suppress petitioners' worship. Pet.Br. 37.

Fear in animals is not at all unique to sacrifice. The City's witness testified that animals experience similar fear in a commercial slaughterhouse or any other strange place. *Id.* Animals obviously experience fear when fleeing from hunters. Because neither the State nor City views these fears as worthy of regulation, fear cannot suddenly become a compelling interest in the case of sacrifice.

With respect to sacrifice itself, the City opens by accusing petitioners of misrepresentation (City Br. 2), and concludes by largely accepting petitioners' characterization of the facts. After carefully analyzing the City's evidence, petitioners concluded: "The City's alleged compelling interest is to protect animals from this brief period of consciousness in those cases in which the priest fails to sever all arteries simultaneously and does not realize that he has failed." Pet.Br. 38. The City quotes this sentence twice. City Br. 39, 39-40. Each time, the City responds that the cruelty begins

before the sacrifice, because of bad conditions in the botanicas. *The City does not argue that the quoted statement mischaracterizes the evidence about the actual sacrifice.*[10]

The trial court accepted Dr. Fox's conclusion that this risk of brief consciousness after inadvertent failures makes Santeria sacrifice inhumane. But it is a legal question whether eliminating this very brief and occasional harm is a compelling interest that overrides a constitutional right. Given the many other ways in which animals can be killed under state and local law, and given that few natural deaths occur in seconds or even minutes, it is apparent that this alleged interest is not generally pursued and is not compelling. Pet.Br. 39-40.

2. The Alleged Threat To Public Health.

The City relies on a risk to public health from improper disposal of carcasses by some persons who sacrifice animals. The City ignores the essence of petitioners' argument, based squarely on the testimony of the public health officer, Mr. Livingstone: this is indistinguishable from any other garbage problem. The City quotes Mr. Livingstone's testimony that the risk of disease from garbage is real, City Br. 33, but they ignore his testimony on the same page that "I haven't been speaking of animal sacrifice at all." Pet.Br. 42.[11]

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[10] The paraphrase at City Br. 39, of Dr. Fox's testimony at R12-887, is inaccurate. Dr. Fox did not say that in Kosher and Muslim slaughter "the animal's neck is completely severed." His phrase "across the neck severance" refers to a knife stroke across the neck that severs the carotid arteries. For an unambiguous statement that Jewish law does not require severance of the neck, see Harry Rabinowicz, *Shehitah*, in 14 *Encyclopaedia Judaica* 1338, 1338 (1971). For the rest of Dr. Fox's testimony concerning the Kosher and Santeria knife strokes, see Pet.Br. 40. With respect to the City's charge that we misrepresented the method of killing, we stand on our summary of the evidence, *id.* at 4-5, 38, 40.

[11] The City says that "the district court found that the disposal of animal carcasses in open public places and consumption of uninspected meat created a 'real' risk of disease. 723 F. Supp. at 1485; R-11-593-94." City Br. 32. The word "real" appears in quotation marks, but it does not appear in the district court's discussion of state interests. The quotation is from the testimony of a witness at R11-594.

Petitioners argued that the trial judge erred "because he equated compelling interest with any incremental reduction of risk." Pet.Br. 43. The City responds that an incremental reduction of risk is a compelling interest -- apparently any reduction of risk. City Br. 32. That standard would suspend all constitutional rights and let the City ban anything, for as Mr. Livingstone testified, there is no "activity a human being can engage in without triggering the risk of disease." Pet.Br. 44. The City has singled out this garbage, not because it is especially dangerous, but because it is unfamiliar and because the City does not respect the religious ritual that produces it.

The City claims that it pursues this problem neutrally because it applies zoning regulations to control where animals may be "raised, kept and slaughtered." City Br. 35. There are multiple problems with this argument. These rules do not prevent other killings of animals in the City, by veterinarians, humane societies, exterminators, pet owners, and the like. But sacrifice is wholly banned.

Equally important, the health problem is not about sacrifice, but only about improper disposal. Recall that even a whole carcass can be safely disposed of in a plastic bag and a garbage can. Pet.Br. 43. The City does not ban meat-eating to prevent improper disposal; neither can it ban sacrifice to prevent improper disposal. The City could, of course, ban improper disposal of any animal or meat scraps no matter how or why the animal was killed.

The City tries to show the magnitude of the improper disposal problem by quoting the trial court's finding that 12,000 to 18,000 animals are sacrificed each year in initiations in Dade County. City Br. 5, 30, 35; Pet.App. A15-A16 n.22. About 80% of these animals are chickens, *id.* at A16 n.25, and in the usual course of the ritual, all of these

animals are eaten, *id.* at A16.

In the abstract, 12,000 to 18,000 animals sounds like a large number. But compare it to the finding that there are 50,000 to 60,000 Santeria believers in South Florida. *Id.* at A11 n.14. Animals sacrificed in initiations are a small fraction of an animal per believer per year.[12] Compared to the 1.9 million people in Dade County,[13] sacrificed animals are less than one percent of a chicken or goat per person per year. This is an infinitesimal fraction of the 253 pounds of per capita annual meat consumption, or of the 5.5 *billion* chicken broilers produced annually in the United States.[14] The scraps from sacrificed animals are a tiny contribution to the garbage problem in Hialeah.

3. The Alleged Threat To Private Health.

The trial court held that there was a compelling interest in preventing consumption of uninspected meat. The City and State do not pursue this interest with respect to hunters, fishers, or farmers, and there was no evidence that anyone had ever gotten sick from eating meat from sacrificed animals. Pet.Br. 44. Once again, the trial court mistakenly

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[12] Using the midpoint of the trial court's ranges, about 55,000 believers sacrifice about 15,000 animals in initiations each year. This would be about 12,000 chickens and about 3,000 other animals, or just over 1/5 of a chicken and 5% of some other animal per believer per year. There is no evidence that adding other rituals would significantly change these fractions. Death and healing rituals involve many fewer animals. Pet. App. A16-A17 & n.26. Perhaps because counsel focused so much attention on the eight-day initiation ritual, the record does not reflect the number of animals in birth, marriage, or annual rituals. The record does show that the annual ritual lasts only one day, and that the animals are eaten. R11-626.

[13] U.S. Bureau of the Census, *Summary Population and Housing Characteristics: Florida*, Table 1 at 4 (1991).

[14] For meat consumption, see U.S. Dept. of Commerce, *Statistical Abstract of the United States*, Table 1452 at 843 (sum of pork, poultry, beef, and veal); for poultry production, see *id.*, Table 1176 at 673.

equated any incremental risk with a compelling interest. *Id.* The City's only reference to consumption of uninspected meat merely repeats, in a conclusory phrase of a misattributed sentence (see *supra* at 16-17 n.11), that there is a risk. City Br. 32. In its discussion of disposal, the City says that exemptions in the meat inspection laws have "nothing to do with the public policy interests pursued by Hialeah in these ordinances," implying that meat inspection is no longer one of those interests. *Id.* at 35.

4. The Alleged Interest In Zoning.

The City's interest in zoning was an undeveloped afterthought in the trial court's opinion. Pet.App. A45. This afterthought has become a centerpiece of the City's argument. But the City's zoning argument adds nothing to its public health argument. The zoning label does not entitle the City to suppress a minority religion just because the majority does not like it. With or without the zoning label, the City's ordinances are subject to *Smith*. Because the laws are not neutral and generally applicable, they require compelling justification.

Petitioners argued that the City "may not exclude a church from all accessible locations within the city." Pet.Br. 46. The City does not dispute this constitutional rule. The City's only response is that it has not zoned out a church, but that it has zoned out slaughterhouses. City Br. 19.

The City's response is triply mistaken. First, when the City excludes the central ritual of a religion, it has zoned out the church. If the City banned communion wine, it could with equal logic say it had not zoned out Catholic churches, but that it had zoned out taverns. Banning religious worship must be justified by a compelling interest, not by an unreviewable label like tavern or slaughterhouse. Second, there is no evidence that sacrifice is equivalent to slaughterhouses or even that it poses any of the problems of slaughterhouses. The proper comparison is not to slaughterhouses, but to restaurants, grocery stores, and the

homes of meat eaters. Pet.Br. 45. Third, the City does not explain how the ordinances can be zoning laws when they ban sacrifice entirely and do not merely confine it to an appropriate zone. *Id.*

CONCLUSION

The City cannot distinguish animal sacrifice from other killings of animals or other disposal of meat scraps. It forbids sacrifice not because it values animal rights over human rights, but because it places no value on petitioners' free exercise of religion. These ordinances are not neutral and generally applicable, and they are not justified by compelling interests. They violate the Free Exercise Clause as interpreted in *Smith*.

The judgment should be reversed, and the case remanded for entry of a decree enjoining enforcement of the challenged ordinances.

Respectfully submitted,

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